

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ALTERRA AMERICA INSURANCE CO.,

Plaintiff,

v.

NATIONAL FOOTBALL LEAGUE, et al.,

Defendants.

Index No. 652813/2012 **E**

Hon. Andrea Masley

Motion Seq. []

DISCOVER PROPERTY & CASUALTY
COMPANY, et al.,

Plaintiffs,

v.

NATIONAL FOOTBALL LEAGUE, et al.,

Defendants.

Index No. 652933/2012 **E**

**INSURERS' MEMORANDUM OF LAW SEEKING PARTIAL REVIEW AND
MODIFICATION OF THE FEBRUARY 26, 2019 MEMORANDUM AND ORDER OF
SPECIAL REFEREE MICHAEL DOLINGER REGARDING THE INSURERS' OMNIBUS
MOTION TO COMPEL**

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PRELIMINARY STATEMENT

Pursuant to CPLR 3104(d), the Insurers¹ respectfully submit this application seeking review of certain portions of the Special Referee's February 26, 2019 Memorandum and Order pertaining to the Insurers' Omnibus Motion to Compel. As set forth more fully below, the Insurers respectfully submit that Special Referee Dolinger incorrectly limited the supplemental search terms he ordered the National Football League ("NFL") and NFL Properties LLC (collectively, the "NFL Parties") to utilize in conducting additional discovery requested by the Insurers. Special Referee Dolinger also erred in denying (or finding no justiciable dispute as to) the portion of the Insurers' Omnibus Motion to Compel seeking the production of [REDACTED]

[REDACTED]

¹ TIG Insurance Company, The North River Insurance Company, United States Fire Insurance Company, Discover Property & Casualty Insurance Company, St. Paul Protective Insurance Company, Travelers Casualty & Surety Company, Travelers Indemnity Company, Travelers Property Casualty Company of America, Continental Insurance Company, Continental Casualty Company, Allstate Insurance Company, solely as successor in interest to Northbrook Excess and Surplus Insurance Company, formerly Northbrook Insurance Company, Bedivere Insurance Company, ACE American Insurance Company, Century Indemnity Company, Indemnity Insurance Company of North America, California Union Insurance Company, Illinois Union Insurance Company, Westchester Fire Insurance Company, Federal Insurance Company, Great Northern Insurance Company, Vigilant Insurance Company, Munich Reinsurance America, Inc., XL Insurance America Inc., XL Select Insurance Company, American Guarantee and Liability Insurance Company, Arrowood Indemnity Company, and Westport Insurance Corporation.

[REDACTED]

[REDACTED]

For the reasons set forth herein, and in the original motion papers before Special Referee Dolinger filed herewith and incorporated herein, the Insurers request that the Court modify the Special Referee's rulings on these specific issues to direct the NFL Parties to (i) utilize the [REDACTED] additional search terms requested here by the Insurers and (ii) produce [REDACTED]

[REDACTED]

[REDACTED]

FACTUAL BACKGROUND

In the interests of economy and space, the Insurers incorporate herein by reference the discussion of the Underlying Litigation, Coverage Action, and Discovery Motions set forth in the separate Insurers' Memorandum of Law Seeking Partial Review of Special Referee Dolinger's Ruling Regarding the Underlying Defense and Settlement Files maintained by the NFL Parties' Defense Counsel [NYSCEF No. 481] and accompanying Affirmation of Christopher R. Carroll. [NYSCEF No. 482]. On August 21, 2018, the Insurers filed an Omnibus Motion to Compel the NFL Parties to use certain search terms and custodians, and to produce certain categories of documents. *See* Affirmation of Matthew J. Aaronson, dated March 14, 2019 ("Aaronson Aff.") at Exhibit 1 ("Omnibus Opening"). The NFL Parties filed an Opposition Brief on September 21, 2018. *See* Aaronson Aff. at Exhibit 2 ("NFL Opp."). The Insurers filed a Reply Brief on October 11, 2018. *See* Aaronson Aff. at Exhibit 3 ("Omnibus Reply").

Thereafter, on February 28, 2019, Special Referee Dolinger issued a Memorandum and Order, dated February 26, 2019, addressing various parts of the discovery motions. *See* Aaronson Aff. at Exhibit 4 ("Order"). Relevant to this application, Special Referee Dolinger ordered the

NFL Parties to utilize ■² of the ■ search terms moved on by the Insurers. With respect to the Insurers' requests for ■

■ Special Referee Dolinger ruled that there is "no litigable dispute about the adequacy of the League's document production." *See Aaronson Aff. Ex. 4, Order at 56.*

ARGUMENT

A. STANDARD OF REVIEW

CPLR 3104(d) allows for review of an order made by a referee or special master. Pursuant to the order appointing the Special Referee in this matter [NYSCEF No. 474], an application for review is timely if made within fourteen days after the ruling under review was issued in writing to the parties via e-mail. The parties received the Order via e-mail on February 28, 2019 and, therefore, this application is timely. *See Aaronson Aff. Ex. 5.*

The Special Referee's decision will be upheld only if it is both supported by evidence in the record and a proper application of the law and discovery standards. *See Stark v. Reliance Nat'l Indem. Co.*, 273 A.D.2d 148, 148 (1st Dep't 2000). However, if the decision is contrary to the applicable law or standards, it must be vacated. *See Surgical Design Corp. v. Correa*, 21 A.D.3d

² Because the submissions to Special Referee Dolinger were designated as Confidential pursuant to the Stipulation and Order for the Production and Exchange of Confidential Information entered in this action on May 22, 2013 ("Confidentiality Order"), and the NFL Parties have advised the Insurers that they believe portions of the Order should be treated as Confidential, the Insurers have redacted certain Exhibits and portions of this Memorandum for filing on NYSCEF pursuant to Paragraph 13(c) of the Confidentiality Order. As required therein, the Insurers will submit an unredacted version of all submissions to the Court on the return date.

409, 411 (2d Dep't 2005) ("Since the Referee's order is not supported by the record, the Supreme Court should have granted plaintiff's motion pursuant to CPLR 3104 to vacate it."); *Those Certain Underwriters at Lloyd's, London v. Occidental Gems, Inc.*, 11 N.Y.3d 843 (2008) (explaining that trial court had discretion to disaffirm the referee's findings of fact, although there was arguable support for those findings in the record).

For the reasons discussed herein, the Insurers seek review of Special Referee Dolinger's Order pursuant to CPLR 3104(d) and seek an order reversing the challenged rulings on the basis that they are contrary to New York law and the broad standard for permissible discovery in this Court.

B. SEARCH TERMS

The Insurers appreciate that Special Referee Dolinger agreed that most of their proposed additional search terms are merited (granting their request on [REDACTED] of [REDACTED] requested additional search terms), and ordered the NFL Parties to supplement their production by utilizing those [REDACTED] terms. Respectfully, however, there are [REDACTED] terms from the [REDACTED] that the Special Referee rejected that the Insurers believe are also plainly warranted and that their exclusion is not supported by evidence in the record.³ Indeed, although the Order does not specify Special Referee Dolinger's reasons for accepting some terms while rejecting others, the Insurers submit that the NFL Parties should also be ordered to utilize the following additional terms for the reasons set forth below:

[REDACTED]

[REDACTED] It chronicles

³ The Insurers believe all of the terms they proposed to Special Referee Dolinger are fair, relevant and reasonable, but in an effort to compromise and streamline discovery, appeal only the [REDACTED] terms identified herein.

many of the key allegations levied against the NFL Parties here, namely that they knew the risks of concussions yet denied, ignored, or actively concealed these risks from NFL players and the public. Although [REDACTED] post-dates the filing of the MDL Action, and on this basis the NFL Parties argued that the term is irrelevant to the historical facts being investigated, as the Insurers noted in their Omnibus Reply, there may exist communications discussing whether the historical events discussed [REDACTED] are accurate. *See* Aaronson Aff. Ex. 3, Omnibus Reply at 15. There may also be communications discussing whether [REDACTED] affected the NFL Parties' decision to settle the MDL Action prior to undertaking discovery. Indeed, the NFL Parties plainly recognized the relevance [REDACTED] themselves by including the term "[REDACTED]" on the terms they initially searched. *See* Aaronson Aff. Exhibit 1, Omnibus Opening at Ex. G. To the extent the NFL Parties claim that searching "[REDACTED]" would duplicate their previous efforts running the search term "[REDACTED]," this ignores the all-too-likely event that there are documents and communications [REDACTED].

[REDACTED]

[REDACTED] In any event, Special Referee Dolinger recognized that, "to the extent that some of these terms overlap with those already utilized, the byproduct of duplicated documents may be eliminated by a so-called de-dupe program." *See* Aaronson Aff. Ex. 4, Order at 49.

[REDACTED]

[REDACTED] portrays important historical developments regarding concussions and head trauma in NFL players, [REDACTED]

[REDACTED] discovery of the alleged link between head trauma and Chronic Traumatic Encephalopathy ("CTE") and allegations that the NFL and members of its Mild Traumatic Brain Injury Committee ("MTBI Committee") [REDACTED]

[REDACTED] after the underlying litigation commenced, there may be subsequent

communications discussing whether the historical events portrayed in [REDACTED] are accurate. There may also be communications discussing whether [REDACTED] affected the NFL Parties' decision to settle the MDL Action prior to undertaking discovery.

[REDACTED] the alleged link between concussions and other traumatic brain injuries in football players and CTE, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

To the extent this search results in documents [REDACTED] that have already been produced, as Special Referee Dolinger recognized, the NFL Parties can easily account for this in the de-duplicating process.

[REDACTED]

[REDACTED] The underlying complaints against the NFL Parties allege a connection between [REDACTED] and thus this search is plainly relevant, and should be ordered to be utilized. *See* Aaronson Aff. Ex. 3, Omnibus Reply at 15-17. As the Insurers noted in their Omnibus Reply, it has been nationally reported that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] See Aaronson Aff. at Exhibit 6 (“Transcript of Proceedings before Special Referee Dolinger on the Discovery Motions (November 27, 2018)”) at 184 (hereinafter “Tr.”). Under these circumstances, the term is plainly relevant, and its exclusion by Special Referee Dolinger is not supported by the evidence or logic.

[REDACTED]

[REDACTED]

[REDACTED] As discussed in the Insurers’ briefing (*see* Aaronson Aff. Ex. 3, Omnibus Reply at 10-12), the Insurers’ document requests to the NFL Parties sought documents and communications to, from, or involving the [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Respectfully, their exclusion is not supported by the evidence.

[REDACTED]

[REDACTED] intended to reduce the risk of concussions [REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] and particularly in light of the NFL Parties' ability to run de-duplicating screening.

The Insurers respectfully believe the terms above will yield relevant and responsive documents, and further note that Special Referee Dolinger rejected the NFL Parties' contention that running additional terms would be unduly burdensome, particularly in light of the issues and dollars at stake in this matter. *See* Aaronson Aff. Ex. 4, Order at 49-50. *See also* Aaronson Aff. Ex. 1, Omnibus Opening at 19-22; Aaronson Aff. Ex. 3, Omnibus Reply at 13-14, 18-21.

C. TEAM AND MANUFACTURER INDEMNITY AGREEMENTS AND COMMUNICATIONS

The Insurers also respectfully request that Special Referee Dolinger's ruling that there is "no litigable dispute about the adequacy of the League's document production" regarding any [REDACTED]⁴ [REDACTED] (Aaronson Aff. Ex. 4, Order at 56) be reversed and modified to require the production of [REDACTED]
[REDACTED]

First, at oral argument the NFL Parties agreed to produce [REDACTED]
[REDACTED] *See* Aaronson Aff. Ex. 6, Tr. at 212-

⁴ The Insurers define "[REDACTED]" in Exhibit B to the Omnibus Opening as "[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]" *See* Aaronson Aff. Ex. 1, Omnibus Opening at Ex. B. at 4-5.

13. As such the NFL Parties have conceded that they will produce [REDACTED]

[REDACTED] In fact, the Insurers also seek [REDACTED]

[REDACTED] “ [REDACTED] ”

[REDACTED] See Aaronson Aff. Ex. 1, Omnibus Opening at Ex. B at 4,

14. [REDACTED]

[REDACTED] are plainly relevant. Aaronson Aff. Ex. 1, Omnibus Opening at 10-11; Aaronson Aff. Ex. 3, Omnibus Reply at 24-26. Accordingly, the NFL Parties’ production should not be limited to [REDACTED] only, but rather should encompass all [REDACTED]

With regard to [REDACTED], Special Referee Dolinger erroneously bases his finding entirely on the NFL Parties’ representation at the hearing that [REDACTED]

[REDACTED] See Aaronson Aff. Ex. 4,

Order at 56.

Special Referee Dolinger’s opinion did not appear to consider (and in fact did not appear to acknowledge) all of the evidence the Insurers presented regarding [REDACTED] [REDACTED] See Aaronson Aff. Ex. 1, Omnibus Opening at 26-28. In short, that evidence includes:

[REDACTED]

[REDACTED]

[REDACTED]

- The Settlement for which the NFL Parties seek insurance coverage in this action defines “Released Parties,” against whom the Settlement releases all claims and establishes covenants not to sue, to include “each of the Member Clubs” and their past, present, and future agents, employees, directors, affiliates, and other related personnel.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] See Aaronson Aff. Ex. 3, Omnibus Reply at 26-27. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] See Aaronson Aff. Ex. 3, Omnibus Reply at 26-27; Aaronson

Aff. Ex. 2, NFL Opp. at Ex. 36. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] See Aaronson Aff. Ex. 3, Omnibus Reply at 26-27; Aaronson Aff. Ex. 2, NFL Opp. at Ex. 36. [REDACTED]

[REDACTED]

[REDACTED] See Aaronson Aff. Ex. 6, Tr. at 215-20. The NFL Parties should be ordered to produce all [REDACTED]

CONCLUSION

For the reasons set forth above, the Insurers respectfully request that Your Honor reconsider the Special Referee's rulings discussed herein and modify the Special Referee's rulings on these specific issues to direct the NFL Parties to (i) utilize the [REDACTED] additional search terms requested here by the Insurers and (ii) produce [REDACTED]

Dated: March 14, 2019
New York, New York

TROUTMAN SANDERS LLP

/s/ Matthew J. Aaronson

Matthew J. Aaronson
875 Third Avenue
New York, NY 10022
(212) 704-6006
(212) 704-5901 (fax)
matthew.aaronson@troutmansanders.com

Richard J. Pratt (*admitted Pro Hac Vice*)
Brandon D. Almond (*Admitted Pro Hac Vice*)
401 Ninth Street, NW, Suite 100
Washington, DC 20004
(202) 274-2950
(202) 654-5807 (fax)
richard.pratt@troutmansanders.com
brandon.almond@troutmansanders.com

*Attorneys for Defendants
XL Insurance America, Inc. and XL Select
Insurance Company*

And on behalf of: Discover Property & Casualty Insurance Company, St. Paul Protective Insurance Company, Travelers Casualty & Surety Company, Travelers Indemnity Company, Travelers Property Casualty Company of America, Continental Insurance Company, Continental Casualty Company, Allstate Insurance Company, solely as successor in interest to Northbrook Excess and Surplus Insurance Company, formerly Northbrook Insurance Company, Bedivere Insurance Company, ACE American Insurance Company, Century Indemnity Company, Indemnity Insurance Company of North America, California Union Insurance Company, Illinois Union Insurance Company, Westchester Fire Insurance Company, Federal Insurance Company, Great Northern Insurance Company, Vigilant Insurance Company, Munich Reinsurance America, Inc., XL Insurance America Inc., XL Select Insurance Company, American Guarantee and Liability Insurance Company, Arrowood Indemnity Company, and Westport Insurance Corporation.